

Service Date: August 12, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF J.E. WILLIAMS)	TRANSPORTATION DIVISION
TRUCKING, INC., Billings, Montana,)	
Application for a Montana)	DOCKET NO. T-93.150.PCN
Intrastate Certificate of Public)	
Convenience and Necessity.)	ORDER NO. 6325

FINAL ORDER

APPEARANCES

FOR THE APPLICANT:

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1371, Bozeman, Montana 59771

FOR THE PROTESTANTS:

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P.C., Attorneys at Law, 203 N. Ewing St., Helena, Montana
59601, Representing Dick Irvin, Inc., Mike McGinley Truck-
ing, Inc., and Prince, Inc.

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Bonnie Lorang,
Program Manager, PSC Transportation Division, 1701 Prospect
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BEFORE:

NANCY MCCAFFREE, Commissioner
DAVE FISHER, Commissioner
DANNY OBERG, Commissioner

INTRODUCTION

1. In October, 1993, J.E. Williams Trucking, Inc. (J.E. Williams), Billings, Montana, filed before the Public Service Commission (PSC) an Application for Intrastate Certificate of Public Convenience and Necessity (application for motor carrier authority). In the application, J.E. Williams requested Class C authority (contract carrier), fertilizer in bulk, for service between all points and places in the state of Montana.

2. J.E. Williams initially identified four shippers who had agreed to support the application and use the contract service if motor carrier authority were to be granted. At hearing J.E. Williams amended the list of supporting shippers and presented two -- Harvest States Cooperative (Harvest States), of Three Forks, Montana, and Simplot Soil Builders (Simplot), of Billings, Montana.

3. Protests to J.E. Williams' application were initially received from three motor carriers: Dixon Brothers, Inc. (Dixon); Dick Irvin, Inc. (Irvin); and W.T. Inc. (WT). By the time of hearing, the authority held by WT had been transferred to Mike McGinley Trucking, Inc. (McGinley Trucking). To the extent any PSC action is required to allow substitution by McGinley Trucking, substitution is allowed.

4. Well before hearing, J.E. Williams (apparently after discussions with Dixon) filed an amendment to its requested authority to include limitations prohibiting transportation of liquid fertilizer in bulk and dry bulk fertilizer for use in blasting or explosive activities. With the amendment, Dixon withdrew its protest of J.E. Williams' application.

5. Shortly prior to hearing Prince, Inc. (Prince), also a motor carrier, petitioned for late intervention. Intervention was granted, over objection of J.E. Williams. The objection was renewed at hearing and a ruling was reserved by the PSC. The matter will be addressed as a conclusion of law.

6. A public hearing on J.E. Williams' application was noticed on February 11, 1994, and held on March 10, 1994, in Billings. All parties were represented by counsel. Witness testimony and documentary evidence was received. Briefs have now been submitted. The PSC has considered the matter, concluding that the application for authority should be denied for the reasons stated in the following findings and conclusions.

FINDINGS OF FACT

7. All introductory statements which can properly be

considered findings of fact and which should be considered as such to preserve the integrity of this order are incorporated herein as findings of fact.

8. First testifying for J.E. Williams were James E. Williams (Williams), its president, and Ray Halsey (Halsey), its dispatcher. These witnesses presented the background and basic elements of J.E. Williams' carrier operations and application for authority. Financial statements, interstate authority for general commodities, intrastate motor carrier authority for cement, and equipment lists were submitted. The witnesses also provided a narrative of J.E. Williams' general business and operations, past and present.

9. Relevant to the present inquiry (application for statewide fertilizer authority), J.E. Williams provided testimony that it currently transports fertilizer interstate, including into Montana. It has equipment enabling it to transport fertilizer, including pneumatic trailers (capable of blowing loads into storage silos or spreading implements). It conducts regular equipment maintenance and personnel safety programs. It has been in operation for over 25 years, principally as an interstate general commodities carrier. Apparently, its bulk transportation activities were commenced only recently, about one year before the time of hearing.

10. Williams and Halsey testified that requests for intrastate service had been received by J.E. Williams in the past fertilizer seasons. The requests apparently indicated that loads needed moved and nobody was available to move them. They also testified as to a probable future increase in demand for transportation of fertilizer (due to an upcoming end to crop acreage reserve programs). Williams and Halsey also explained how the grant of authority would "dovetail" with J.E. Williams' interstate operations (besides an assertion of need, "dovetailing" was also a condition relied on by J.E. Williams to justify a grant of authority). To the extent not specifically expressed, Williams' and Halsey's testimony imply that J.E. Williams does want and is willing and able to perform the services needed by the supporting shippers.

11. Jay Hankin (Hankin), the fertilizer manager of Harvest States (supporting shipper), as a witness for J.E. Williams, testified that Harvest States has elevators throughout the state, but only expressed a need for short hauls out of Three Forks (service from Three Forks to the Butte, Toston, Twin Bridges, Dillon areas, or a maximum 90 mile radius of Three Forks, most

need being within a 60 mile radius of Three Forks). He testified that at least one of his customers requires pneumatic capabilities. He testified that he would use J.E. Williams if authority were granted.

12. Hankin's testimony in regard to existing carriers (the protestants) soliciting business from Harvest States is somewhat unclear. However, it appears that: Irvin had contacted him recently, but only seldom in the past; McGinley had contacted him recently; and Prince had never contacted him. Hankin (Harvest States) had used Irvin for interstate moves and found service to be satisfactory. Hankin testified that he had no objection to the existing carriers and that he had not contacted Prince, Irvin, or McGinley. He supports J.E. Williams, as it seems to keep in touch and do a good job of coordinating with him for shipments.

13. W. Allen Broyles (Broyles), manager of Simplot's (supporting shipper) Billings plant and also having some responsibilities for Simplot's Hysham plant, testified to a need for service in the range of 75 to 100 mile radius of Billings and Hysham and from Butte to Billings. He testified that J.E. Williams, Irvin, and Prince had transported for him (or his suppliers) interstate.

14. Broyles testified that neither Irvin nor Prince had solicited intrastate business from him. He stated that Irvin had not been able to provide service to him on the intrastate level. He stated that Prince had transported one load as a convenience after an interstate haul and did not show up for another scheduled intrastate movement (the details, time, place, who was contacted within Prince, were unavailable). In regard to McGinley Trucking, Broyles testified that McGinley had told him that he transports only cement. Apparently this message had been conveyed at some time in the past (over a year ago according to Broyles and about six years ago according to later testimony by McGinley).

15. Broyles feels that the existing carriers have had every chance to provide service, but that they do not care to do so unless their equipment is doing nothing else. However, there is some indication that, until recently, Simplot had provided its own short haul transportation and had little contact with the existing carriers for intrastate movements. Broyles also stated that he believes that the existing carrier freight rates are too high.

16. Williams, Halsey, Hankin, and Broyles all described the

fertilizer business as seasonal, the spring and fall of each year being when the demand for transportation is greatest. Hankin described it as a "panic for transportation." Hankin testified that the busy seasons are 90 days in the spring and 60 days in the fall. Broyles testified to a 120 day spring and 90 day fall season.

17. The record discloses no material disagreement with the seasonal nature of the supporting shippers' fertilizer businesses. Although there is some disagreement as to the way in which the need for transportation during the supporting shippers' busiest periods could be met, there is no disagreement that there can be a significantly high demand for transportation at times. Williams indicated that even with a grant of authority to J.E. Williams the peak demand might not be met.

18. The protestants first called Carroll Kaup (Kaup), employed by Prince, whose main office is in Forsyth, as its dispatcher. Kaup testified that Prince's principal service is bulk pneumatic hauling. He testified that it has trucks based in Billings. He indicated that on annual solicitation calls he has visited Simplot, but received no indication that they were commencing intrastate service until about one year ago. Kaup also testified that Prince has a truck based in Three Forks and that it is capable of hauling fertilizer. He indicated that the vehicle is not dedicated to transporting only cement.

19. He testified that Prince advertises and lists in the Yellow Pages. He testified that Prince had done interstate and intrastate work for Simplot, but has been told that they now do not have work for Prince. Kaup testified that Prince has no problem in doing fertilizer short hauls out of Three Forks. Kaup testified that Prince does want, and can do, the service needed by the supporting shippers.

20. The next protestant witness was Mark Cole (Cole), general manager of Irvin. Cole testified that Irvin, whose main office is in Shelby, specializes in bulk pneumatic movements of dry commodities interstate and intrastate. He indicated that Irvin has equipment throughout the state. He indicated that Irvin's fertilizer operations actually began in servicing short haul farm accounts, but, in the last several years with acreage in reserve, there has been less of a market.

21. Cole testified that Irvin solicits business and advertises, including in the Yellow Pages. Cole testified that unauthorized carriage is a problem (apparently in the context of contributing to existing carriers dedicating equipment in areas).

He assumes that the PSC is aware of it and will do something about it. He commented on economic efficiency in maintaining equipment to transport loads during peak seasons. He indicated that there are short delays in transportation during peak periods, but that he felt Irvin could fill any need within one day (24 hours), subject to weather. To the extent not specifically expressed, Cole's testimony implies that Irvin does want, and is willing and able to do, the service needed by the supporting shippers.

22. The next protestant witness was Mike McGinley (McGinley), owner of McGinley Trucking. He testified that pneumatic dry bulk is McGinley Trucking's primary business. He is interested in transporting fertilizer and is intending to expand his business. To the extent not expressed, McGinley's testimony implies that McGinley Trucking does want, and can do, the service needed by the supporting shippers.

23. All protestants are motor carriers with authority to provide all or part of the services proposed by J.E. Williams. Prince has PSC No. 1711, which in relevant part, permits the transportation of fertilizers statewide. Irvin holds PSC No. 1649, with three provisions applying to transportation of fertilizer. One (Sub E) is limited to a 200 mile radius of Missoula with origination or termination in Missoula or Ravalli Counties. The others (Sub B and Sub R) are statewide (the nature of these Irvin authorities is disputed by J.E. Williams, a point that will be discussed in the conclusions of law). McGinley Trucking maintains PSC No. 1811, permitting transportation of fertilizer statewide. The record also discloses that all protestants also have, and routinely employ, pneumatic trailers.

24. All carriers involved, the applicant and protestants alike, testify that they are fit, ready, willing, and able to transport, and are willing to abide by the laws of motor carriage. It also appears that they all, applicant and protestants alike, are willing to commit to short haul intrastate moves. With some minor qualifications, the protestants seem to agree that they have not actively solicited intrastate business from the supporting shippers until recently. At the same time, it appears that the supporting shippers witnesses did not actively contact the existing carriers either. There is no clear indication that the supporting shippers contacted the existing carriers (protestants) for intrastate moves in any reasonable way or at any reasonably recent time relevant to this proceeding. There appears to be a communication problem running both ways (this

will also be discussed in the conclusions of law).

CONCLUSIONS OF LAW

25. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this order are incorporated herein as conclusions of law.

26. The PSC has jurisdiction over applications for motor carrier authority pursuant to Title 69, Chapter 12, MCA. The application of J.E. Williams is proper in form and was properly noticed, protested, and heard in accordance with Title 69, Chapter 12, MCA, and Title 2, Chapter 4, MCA (Montana Administrative Procedures Act).

27. The first matter requiring a ruling is J.E. Williams' renewed objection to intervention by Prince (having granted intervention prior to hearing, the PSC will treat the renewed objection as a request for reconsideration). Intervention is objected to by J.E. Williams on due process grounds, primarily in that there was no opportunity to conduct prehearing discovery on Prince. J.E. Williams requested dismissal or continuance to allow discovery, which J.E. Williams feels would disclose that Prince has not provided the services proposed, no diversion of traffic would be present if authority were granted, and Prince has not solicited business from the supporting shippers.

28. Pursuant to notice of J.E. Williams' application, protests (interventions) were due by November 25, 1993. Prince's petition to intervene was filed March 1, 1994, about ten days prior to hearing. In PSC contested case matters (which include applications for motor carrier authority) parties have the right to conduct discovery. Due to late intervention by Prince, J.E. Williams had no opportunity for discovery and, technically, its right was denied.

29. However, the PSC observes that J.E. Williams did no discovery on the other protestants. It also observes that legal counsel for Prince is the same as that for the other protestants. Whatever informal discussions may have eliminated J.E. Williams' need for discovery on the other protestants would easily have done the same for the perceived need for discovery on Prince. Furthermore, what J.E. Williams would have sought in discovery, developed at hearing the way J.E. Williams expected, as Prince essentially agreed that it has not provided the services proposed, no diversion of traffic would be present if authority were granted, and Prince has not solicited intrastate business from

the supporting shippers.

30. Possibly J.E. Williams' real concern about Prince is related to another point that J.E. Williams has raised as to Irvin and McGinley. It is J.E. Williams' position that Irvin's authority does not extend to its proposed areas of service. It is J.E. William's position that McGinley Trucking is interested in transporting cement only. Therefore, if Prince were allowed to intervene there might be a legitimate protest where none would exist otherwise.

31. The PSC concludes that a ruling denying Prince's intervention would be inconsequential to the outcome of this case (it therefore affirms intervention in the interests of building a complete record on the matter) as the two remaining protestants, Irvin and McGinley Trucking, both have statewide authority. Under the circumstances, Prince's intervention does not appear to prejudice J.E. Williams. The PSC's decision would be the same whether Prince remains a party or not. Nevertheless, late intervention is not to be encouraged, rights of parties can be impaired through late intervention. Interested persons, particularly motor carriers, should intervene in a timely fashion.

32. J.E. Williams also objected to the testimony of Prince's witness, Kaup, as Kaup was unsure of whether corporate approval had been given for his testimony. The objection was taken under advisement. The corporate approval objection is not unheard of, and to some extent, at some times, it is valid. However, it remains somewhat of a mystery to the PSC under the circumstances. An objection pertaining to witness authority is usually directed at the competence of shipper witnesses, "public" witnesses, or other witnesses who appear at hearings as a representative of an association, corporation, government body, or other entity that has not formally intervened or appeared as a party. When there is formal intervention, such as in the case of Prince, the objection makes little sense. Prince is an intervenor, a party to the case. It can be implied that who Prince has designated to appear as a witness has all corporate authority that might be required.

33. Another reserved matter pertains to the extent of Irvin's authority as it relates to J.E. Williams' application. In this regard Irvin has three authorities to which J.E. Williams' proposed operations could compete. One is for Missoula and 200 miles radius (Sub E) with service originating and terminating in Missoula or Ravalli Counties. The PSC sees no significant potential for conflict between this authority and J.E.

Williams' proposed operations and, therefore, there is no need to discuss it further. The other authorities (Sub B and Sub R) remain a point of contention (Sub R appeared to be the focus of the parties' attention at hearing, but Sub B is definitely an important one for consideration).

34. In this regard, J.E. Williams moved to strike the testimony of Cole on the basis that under Irvin's authority Irvin has no ability to transport fertilizer. The PSC overruled the objection, but allowed J.E. Williams to brief the matter as a point for reconsideration. Cole testified that a question of interpretation periodically comes up about the meaning of the authority, but the authority has been used to transport fertilizer as an agricultural supply for 20 to 40 years. The files of the PSC indicate that the PSC, as early as 1973, held that Irvin's authority, Sub B (not Sub R), which pertains to supplies useful in storage of water (storage through maintenance of the watershed) authorized the transportation of fertilizer. Whether that opinion was right or wrong, it is a long standing and binding opinion of the PSC, relied on by Irvin for a significant period of time (time in which an opinion to the contrary may have been remedied by an application for authority or purchase of authority), and there can be, and will be, nothing done to attempt to change it at this time.

35. Irvin's other authority (Sub R) reads "equipment, machinery, supplies and building or construction materials" statewide. J.E. Williams argues that "supplies" modifies "equipment and machinery" or "building or construction materials." The PSC neither agrees nor disagrees. However, informally, although not a model way of stating it, in context it appears that "supplies" could be viewed as a stand-alone term. It might modify neither "equipment and machinery" nor "building or construction materials." What would need to be done to interpret it properly would be a review of the record pertaining to the creation of the authority. The PSC finds that it is unnecessary to do this as the interpretation of Sub B resolves the matter.

36. On another preliminary point, as required, J.E. Williams submitted contracts as part of its application. One of the contracts submitted contained what amounted to a confusing provision involving a \$6 per ton rate with, what appeared to be, the possibility for unlimited miles. If this rate were intended to be a fixed rate it most certainly would not be compensatory, except on short hauls. The PSC finds (from testimony on the point) that the amount pertains only to a specific short haul and

inadvertently was presented in a fashion indicating that it would apply to longer hauls.

37. Turning now to analysis of elements of an application for authority and the legal merits of those as pertaining to J.E. Williams' application for authority, the PSC will grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. See, Section 69-12-323(2), MCA. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority in Montana when each of the required elements has been demonstrated.

In this regard, Section 69-12-323(2), MCA, provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefor shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous throughout 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

38. In the Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), includes a narrative statement of the required elements (these elements are stated in numerous PSC opinions and in one or more court opinions, sometimes in different ways, but all being the same in ultimate meaning):

Applying this language [Section 69-12-323(2), MCA] to the facts presented by any application for authority, the Commission has traditionally undertaken the following analysis:

First, it asks whether the Applicant has demonstrated that there is a public need for the proposed services. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the Applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an Applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied.

If the answer is no, then the application will be granted, assuming the Commission determines the Applicant fit to provide the proposed service.

39. The first element in determining whether a certificate should be granted concerns the "need" for the service. There must be a demonstrated need for the services proposed. If there is no such demonstrated need, public convenience and necessity does not require a grant of authority. The PSC concludes that J.E. Williams, through its supporting shippers did demonstrate a need. The supporting shippers are in the business of selling fertilizer and they need transportation services to receive fertilizer from suppliers and deliver fertilizer to customers.

40. The need expressed by the supporting shippers, however does not extend statewide. For each shipper it was for service within a limited area. Harvest States established a need only within a maximum radius of 90 miles from Three Forks. Simplot established a need only within a maximum radius of 100 miles from Billings and Hysham and from Butte to Billings. There is no shipper evidence in the record establishing any other need. The need is not statewide.

41. J.E. Williams, through both Williams and Halsey,

testified as to a need (they had received requests for service and the fertilizer business was increasing). However, neither of these witnesses is a shipper. Testimony as to need by one who is not a shipper is of limited consequence and will not establish need beyond that which is established by shipper witnesses. "It is axiomatic that in order to demonstrate need to support a certificate of public convenience and necessity an applicant must present shipper witnesses who can testify from their personal experience that a need exists for the proposed service." Matter of Jones Brothers Trucking, Inc., Id., p. 9. It is a shipper witness who must establish the need, the commodities to be shipped, the points between which shipments must be made, the volume of freight anticipated, and other material factors, and stand cross-examination on the testimony which establishes those things.

42. As part of its application, J.E. Williams, also indicated that a condition justifying a grant would be the "dovetail" with its interstate operations. Although it is uncertain where this assertion falls within the elements, the PSC will address it under need. In this regard, the PSC concludes that there is no recognized supporting legal principal or convincing argument made in the record to conclude that this concept is, or should be, a factor in justifying a grant of authority.

43. The second element involves the ability of existing motor carriers to meet the demonstrated need. If existing carriers can meet the need, public convenience and necessity does not require a grant of an additional authority. The PSC concludes that one or more or all of the existing carriers protesting the application can meet the transportation needs established.

44. First of all, existing carriers must be given the opportunity to provide the service before the PSC can conclude that the existing carrier will not or cannot perform as the shipper needs. See generally, In the Matter of Keller Transport, Inc., PSC Docket No. T-8784, Order No. 5647a, p. 24 (1986). The record discloses that the existing carriers were not given such opportunity.

45. In relation to this, solicitation of business seems to be a key point argued by J.E. Williams. The argument is that the protestants have not solicited business from the supporting shippers (at least until recently) and this should be construed as demonstrating and unwillingness to serve. However, when and how and whether to engage in solicitation of shipper business is

predominantly a carrier's business management decision, not a legal requirement. Although solicitation may be advisable at times, under most circumstances and the circumstances of this case, carriers are required only to have a reasonable presence in an area. If a carrier has a reasonable presence, it is up to the shippers needing service to contact the carriers for that service. All of the protestants have a reasonable presence in the areas in which the supporting shippers expressed a need. All at the least have listings in the Yellow Pages, a recognized minimum presence. Furthermore the shippers knew of each of the existing carriers.

46. In regard to reasonable presence, solicitation, and shipper request for service, the PSC detects a communication problem between carriers and shippers. In this case the PSC sees some indication that the shippers might be communicating with the carriers' local drivers or owner operators and the carriers might be communicating with whoever happens to answer the phone at the shippers' places of business. Those persons with final authority to actually make firm transportation arrangements or plans within both the carriers' and shippers' businesses should communicate directly with each other and keep each other closely informed of the needs and abilities reasonably in advance of, and certainly during, the seasons in which transportation is required.

47. As another point that deserves some comment, there appears to be an undercurrent of belief that the price charged by the existing carriers is too high and, possibly, that J.E. Williams, as a contract carrier would be able to offer or negotiate a more favorable amount. Rates charged by motor carriers, common or contract, must be compensatory. Commonly, one unfamiliar with the details of carrier ratemaking, particularly a contract carrier just entering the field (the PSC is not necessarily referring to J.E. Williams), will propose rates that seem attractively low to supporting shippers, but ultimately prove to be insufficient. The PSC suspects that a belief that rates are too high might not be accurate. However, although rate cases are complex, if a shipper affected by rates of any carrier has a verifiable basis to challenge the rates as being unjust or unreasonable, a formal proceeding (complaint) can be commenced before the PSC to address it.

48. In arguments, J.E. Williams suggests that the protestants have a preference for transporting cement because of the increased tonnage per volume. The record does not reflect this in any substantial way, but actually seems to indicate to the

contrary -- there is no such preference. The PSC also believes that the record reflects that tonnage, not volume, is the determinative factor in load limits.

49. A final point on ability of existing carriers to meet the need regards peak seasonal demand and the economic efficiency to meet such. Williams suspected that even J.E. Williams, if granted authority could not meet peak demand -- shippers cannot find enough truckers to transport as needed during peak demand. Peak demand seems to be an important point of J.E. Williams in regard to need and ability to meet the need. However, in some instances peak demand could be such that hundreds of trucks might be required to meet everyone's needs during a particular day during the fertilizer season, only to remain idle for the rest of the year.

50. The economic efficiency of this, in the carrier context, is obviously non-existent and even detrimental. The PSC cannot create such a situation that is contrary to the overall public interest. Compensatory rates would be unacceptably high to absorb the cost of idle equipment. Although not discounting the need in the shippers' customers to apply fertilizer in a timely fashion, shippers (and their customers) and carriers must, to a certain extent, attempt to meet the needs through coordination and planning. It appears that the best means of addressing the problem is that the lines of communication be improved so that shippers and carriers can coordinate moves in an expedient way. If reasonable demands are made and not met by existing carriers the PSC will entertain a request to reconsider the matter (in a future application for authority). The PSC does not see from the record that the existing carriers have been given a reasonable opportunity to transport and meet the needs of the shippers in at least a reasonable way.

51. The third element regards the effect that a grant of authority would have on existing transportation services. If existing transportation services would be harmed by a grant of authority and that harm is contrary to the public interest, public convenience and necessity does not require a grant of authority. As it pertains generally, this element applies only when existing carriers cannot meet the need. The carriers can meet the need and harm is essentially immaterial and need not be considered.

52. Apparently in regard to the element of harm, J.E. Williams stresses that there would be no diversion of traffic or erosion of the customer base of the protestants if authority were

granted to J.E. Williams. Diversion of traffic and erosion of customer base bears only on harm to existing carriers and is a valid consideration only if the PSC reaches the question of harm.

As indicated above, the question of harm to existing carriers need not be answered in this docket.

53. The fourth element is fitness of the applicant requesting authority to perform the services proposed. If an applicant is not fit, willing, and able to perform the services, public convenience and necessity does not require a grant of authority.

The PSC concludes that J.E. Williams is fit, willing, and able to provide the services proposed. There is no substantial fact or valid legal argument in the record to the contrary.

54. From the above, in this case there is at least one of the elements of "public convenience and necessity" that dictates that the requested authority for the proposed services cannot be granted. Public convenience and necessity does not require a grant of authority for the services proposed, as one or more of the existing motor carriers, already authorized to perform the services, can meet all reasonable need that may have been demonstrated by the supporting shippers.

55. As a final point for discussion, at hearing Irvin (through its witness, Cole) commented on what it apparently believes is a notable existence of unauthorized carriers transporting fertilizer. The inference is that this is an impediment to the proper functioning of certificated motor carriers. The PSC's formal complaint process is available to the public, shippers, and carriers to formally review and process reasonably verifiable assertions that there is illegal transportation being conducted, including in the transportation of fertilizer. If illegal transportation is suspected by Irvin, it has the formal complaint procedure available to it.

ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this order are incorporated herein as an order.

2. All pending objections, motions, and arguments not specifically having been ruled on in this Order, if any, shall be deemed denied, to the extent that such denial is consistent with this Order.

3. The Montana Public Service Commission, being fully apprised of all premises, HEREBY ORDERS that the Application for Intrastate Certificate of Public Convenience and Necessity filed by J.E. Williams, Billings, Montana, be DENIED.

Done and dated this 8th day of August, 1994, by a vote of 3-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

NANCY MCCAFFREE, Commissioner

DAVE FISHER, Commissioner

DANNY OBERG, Commissioner

ATTEST:

Ann Purcell
Acting Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.